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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 173.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, SUING FOR THE BENEFIT OF JAMES S. KENYON, DOING BUSINESS AS BURROWS & KENYON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

FILED DECEMBER 26, 1905.

(20,024.)

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INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	2
Caption	3	2
Writ of summons	3	2
Marshal's return to writ of summons	4	3
Declaration	5	3
Plea of defendant The United States Fidelity and Guaranty Company	8	5
Replication	8	5
Motion to dismiss for want of jurisdiction	9	5
Motion to dismiss for want of jurisdiction denied	9	5
Bill of exceptions	10	6
Statement of exceptions	10	6
Judge's certificate	11	7

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	Original.	Print.
Judgment	11	7
Petition for writ of error	12	7
Assignment of errors	13	7
Bond on writ of error	14	8
Order allowing writ of error	15	9
Certificate of jurisdictional question by trial judge	16	9
Opinion of the court, August 17, 1904	17	10
Citation on writ of error	31	17
Acknowledgment of service of citation	31	17
Certificate of clerk to transcript of record	32	18

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Rhode Island, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States of America suing for the benefit of James S. Kenyon of the City and County of Providence and State of Rhode Island, doing business as Burrows & Kenyon plaintiff, and Joseph J. Churchyard of the City of Buffalo State of New York, and the United States Fidelity & Guaranty Co. a corporation created under the laws of the State of Maryland, defendants a manifest error hath happened, to the great damage of the said The United States Fidelity and Guaranty Company defendant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the city of Washington, D. C., on the* 30th day of December next, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of December, in the year of our Lord one thousand nine hundred and five.

[Seal Circuit Court, Rhode Island.]

WILLIAM P. CROSS,
Clerk of the Circuit Court of the United States,
District of Rhode Island.

Allowed by
ARTHUR L. BROWN,
United States District Judge.

*Not exceeding 30 days from the day of signing the citation. Rule 14, Sec. 5.

2 *Return of Circuit Court on Writ of Error.*

CIRCUIT COURT OF THE UNITED STATES,
District of Rhode Island, ss:

And now, here, the Judges of the Circuit Court of the United States, in and for the District of Rhode Island, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Supreme Court, as within commanded.

In Testimony Whereof, I William P. Cross Clerk of said Circuit Court of the United States, in and for the District of Rhode Island, have hereto set my hand and the seal of said Court this 19 day of December A. D. 1905.

[Seal Circuit Court, Rhode Island.]

WILLIAM P. CROSS, *Clerk.*

3 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA, *District of Rhode Island:*

At a Circuit Court of the United States, begun and holden at Providence within and for the District of Rhode Island, on the fifteenth day of November, in the year of our Lord, one thousand nine hundred and five.

Present: The Honorable Arthur L. Brown, District Judge.

Law. 2713.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSEPH J. CHURCHYARD and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendants.

The Writ and Declaration in this action were filed in the clerk's office of this court, to wit: on June 23, 1903, and are in the words and figures following, viz:

Writ.

(Filed June 23, 1903.)

[L. S.] The President of the United States of America to the Marshal of the United States for the District of Rhode Island, or his Deputy, Greeting:

We command you to summon Joseph J. Churchyard of the City of Buffalo County of Erie and State of New York and the
4 United States Fidelity and Guaranty Company, a corporation created and existing under the laws of the State of Maryland

and doing business in the State of Rhode Island, to answer the complaint of the United States of America suing herein for the benefit of James S. Kenyon of the City and County of Providence and State of Rhode Island, doing business as Burrows & Kenyon, at our Circuit Court next to be holden at Providence, within and for said district on the 16th day of November now next ensuing in an action of debt on bond under seal and bearing date the 9th day of August A. D., 1899, as by declaration to be filed in court will be fully set forth; to the damage of the plaintiff as it says Five hundred dollars. Hereof fail not, and make true return of this writ with your doings thereon.

Witness, the Honorable Melville W. Fuller, our Chief Justice at said Providence, this 10th day of June in the year one thousand nine hundred and three.

WILLIAM P. CROSS, *Clerk.*

Marshal's Return to Writ.

UNITED STATES OF AMERICA, *District of Rhode Island:*

At Providence in said district this 18th day of June, 1903, I made service of this writ on the within named United States Fidelity and Guaranty Company by leaving a true and attested copy of the same in the hands and possession of Charles H. Beach, Agent of the aforesaid Fidelity and Guaranty Company, and attorney to receive for said company in said district.

RICHMOND J. STONE,
Deputy United States Marshal.

Fees: $2.30.

Declaration.

(Filed June 23, 1903.)

The United States of America, suing herein for the benefit of and on behalf of James S. Kenyon of the City and County of Providence and State of Rhode Island, doing business as Burrows & Kenyon, comes and complains of Joseph J. Churchyard of the City of Buffalo, County of Erie, in the State of New York, as principal, and The United States Fidelity and Guaranty Company a corporation created and existing under the laws of the State of Maryland, and doing business in the State of Rhode Island, as surety duly held to answer the said plaintiff in an action of debt. For that heretofore on the 29th day of June, A. D. 1899 the United States of America, by its certain officers and agents, entered into an agreement in writing with the said Joseph J. Churchyard to furnish labor, materials, tools and appliances to construct one Non Commission- Officers' Quarters at Fort Greble, Rhode Island.

And in consideration of the said agreement and as a condition precedent thereto, the said United States of America did require

and exact of the said Joseph J. Churchyard a certain bond in the sum of Five Hundred Dollars ($500.), conditioned, among
6 other things, the the said Joseph J. Churchyard shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in the said contract.

And thereupon the said The United States Fidelity and Guaranty Company, as surety, did make, execute and deliver, at Newport in the District of Rhode Island, and the said United States of America did accept the same as satisfactory to it on the 9th day of August, A. D. 1899, their certain bond or guaranty in the sum of Five Hundred Dollars ($500.) (and here ready to be shown to this court) wherein they acknowledge themselves to be jointly and severally bound to the United States of America in the said sum of Five Hundred Dollars ($500.), which bond, among other things, provided that if the said Joseph J. Churchyard his heirs, executors or administrators shall promptly make payments to all persons supplying him or them labor or materials in the prosecution of the work provided in said contract, then the said obligation shall be void and of no effect; otherwise to remain in full force and virtue.

That the said Joseph J. Churchyard thereupon entered upon the performance of the said contract and ordered of the said James S. Kenyon, doing business as aforesaid, large amounts of materials to be used in and for the construction of the Non Commission- Officers' Quarters referred to in said contract and then and there promised to promptly pay for the same. Whereupon the said James S.
7 Kenyon doing business as aforesaid, furnished to the said Joseph J. Churchyard said materials, but the said Joseph J. Churchyard, although often requested, has not made prompt payment for the same.

That in consideration of the materials furnished by the said James S. Kenyon, doing business as aforesaid, and the non payment of the same as aforesaid, said defendants became and are indebted to the said United States of America for the benefit of the said James S. Kenyon, doing business as aforesaid, in the sum of Sixty Six Dollars and Five Cents ($66.05), which said sum, so due and owing to him, the said defendants or either of them have not paid, but have totally neglected and refused to pay the same.

Wherefore, in and by the statute in such cases made and provided and of law, the right hath accrued to the said plaintiff to bring its said action to recover and receive of said defendants the said sum of money so due and owing, which though of said defendants often requested, they have utterly refused and neglected, and do refuse and neglect to pay.

To the damage of the said plaintiff Five Hundred Dollars ($500.) as laid in its said writ bearing date the 10th day of June, A. D. 1903.

EDWARD D. BASSETT,
Plaintiff's Attorney.

8 Thereafter there was filed, to-wit, on March 24, 1904, the following

Plea of Defendant The United States Fidelity and Guaranty Company.

(Filed March 24, 1904.)

The said defendant The United States Fidelity and Guaranty Company comes and defends the wrong and injury when, etc., and says it does not owe said sum of money above demanded or any part thereof in the manner and form as the said plaintiff hath above complained.

And of this the said defendant The United States Fidelity and Guaranty Company puts itself upon the country.

By Its Attorney, JAMES E. SMITH.

To which plea the plaintiff, to-wit, on May 9, 1904, filed the following

Replication.

(Filed May 9, 1904.)

First. The said plaintiff as to the plea of the said defendant the United States Fidelity & Guaranty Company, by it first above pleaded and whereof it hath put itself upon the country, doeth the like.

By Its Attorney, E. D. BASSETT.

6 On May 26, 1904, the defendant The United States Fidelity and Guaranty Company filed the following,

Motion to Dismiss for Want of Jurisdiction.

(Filed May 26, 1904.)

The defendant, the United States Fidelity & Guaranty Company, comes and moves that the above entitled action be dismissed for want of jurisdiction.

By Its Attorneys, JAMES E. SMITH,
EDWARDS & ANGELL.

The cause came on for hearing, to-wit, on the said 26th day of May, 1904, the Honorable Arthur L. Brown, District Judge, being present and presiding, on the foregoing motion to dismiss and was fully argued by counsel for the respective parties, the decision of the court was announced on the 17th day of August, 1904, and the motion to dismiss was denied and dismissed.

Thereafter, to wit, on November 15, 1905, the case came on for hearing on issues of fact before the Honorable Arthur L. Brown, District Judge, jury trial being waived in writing, testimony for

plaintiff submitted, defendant submits no testimony but moves to dismiss for want of jurisdiction and motion is denied, exceptions taken and allowed, and the court finds generally for the plaintiff and assesses damages at Two Hundred and six dollars and forty-seven cents.

10 Thereafter, to wit, on November 27, 1905, there was presented by the defendant, the United States Fidelity & Guaranty Company the following

Bill of Exceptions.

(Allowed, November 27, 1905.)

Be it understood that on the hearing of this cause in this court, at the November Term, A. D. 1905, of said Court, the Hon. Arthur L. Brown, Judge, presiding, when the following proceedings were had, to-wit:—Said cause came on for hearing, jury trial being waived in writing by the parties, and thereupon at the close of the evidence in chief offered by the plaintiff, the counsel for the defendant moved the Court to dismiss said action on the ground that the Circuit Court of the United States had no jurisdiction to entertain said action which is an action in the name of the United States, for the use and benefit of a person supplying labor and materials for public buildings, upon a certified copy of a bond given under the provisions of an Act of Congress of August 13, 1894, Chap. 280, Sec. 1, 28 Stat. 278, entitled "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works", the amount in dispute being less than two thousand dollars, which said motion to dismiss was denied, and thereupon, the defendant not offering any testimony on its part, judgment was entered for the plaintiff for the amount of its claim, to all of which the defendant excepted.

And now in furtherance of justice and that right may be done, the defendant, The United States Fidelity & Guaranty Com-
11 pany tenders and presents the foregoing as its bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record and the same is accordingly done this 27th day of November, 1905.

Presented within extended time and allowed the 27th day of November, 1905.

ARTHUR L. BROWN, *J.*

The foregoing Bill of Exceptions being allowed by direction of the Hon. Arthur L. Brown, District Judge and in accordance with finding of the court heretofore made there is entered this 27th day of November, 1905, the following

Judgment.

(Entered November 27, 1905.)

It is considered by the Court that the defendant The United States Fidelity and Guaranty Company is indebted to the plaintiff in the sum of Five Hundred Dollars, and the plaintiff having proved damages to the amount of Two Hundred and Six and 47/100 Dollars,

It is further considered by the Court that the plaintiff have and recover of the said defendant, The United States Fidelity and Guaranty Company for the use and benefit of said James S. Kenyon, doing business as Burrows and Kenyon the sum of Two Hundred and Six and 47/100 Dollars, and costs taxed at Twenty-six and 20/100 Dollars.

12 Thereafter, to-wit, on November 29, 1905, the defendant, the said The United States Fidelity and Gauranty Company filed a Petition for Writ of Error, Assignment of Errors and Bond to Party on Writ of Error, and the said bond is approved and writ of error allowed, to wit, on December 4, 1905.

Petition for Writ of Error.

(Filed November 29, 1905.)

And now comes the United States Fidelity & Guaranty Company, plaintiff herein, and says:

That on the 27th day of November, A. D., 1905, the Circuit Court of the United States, for the District of Rhode Island, entered a judgment in the above entitled action in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the plaintiff herein, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By Its Attorneys, JAMES E. SMITH,
EDWARDS & ANGELL.

13 *Assignment of Errors.*

(Filed November 29, 1905.)

The plaintiff in error in connection with its petition for a writ of error makes the following assignment of errors which it avers occurred upon the hearing of said cause, to wit,

First. The Court erred in refusing to grant the motion of the plaintiff in error to dismiss said action for lack of jurisdiction.

Second. The Court erred in holding that the Circuit Court of the United States has jurisdiction to entertain an action in the name of the United States, for the use and benefit of a person supplying labor and materials for public buildings, upon a certified copy of a bond given under the provisions of an Act of Congress of August 13, 1894, Chap. 280, Sec. 1, 28 Stat. 278, entitled, "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works", wherein the amount in dispute was less than two thousand dollars.

Wherefore, the plaintiff in error prays that the judgment of said Circuit Court may be reversed.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By Its Attorneys, JAMES E. SMITH,
EDWARDS & ANGELL.

14 *Bond to Party on Writ of Error.*

(Approved December 4, 1905.)

Know all men by these presents, That we, The United States Fidelity & Guaranty Company, a corporation incorporated under the laws of the State of Maryland, as principal, and Fidelity & Deposit Company of Maryland, a corporation incorporated under the laws of said state of Maryland, as surety, are held and firmly bound unto United States of America in the full and just sum of five hundred dollars ($500.) to be paid to the said United States of America, its certain attorneys or assigns; to which payment, well and truly to be made, we bind ourselves, and our respective successors, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of November in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Circuit Court of the United States for the District of Rhode Island in a suit depending in said Court, between United States of America for the use of James S. Kenyon, doing business as Burrows and Kenyon, plaintiff and The United States Fidelity & Guaranty Company, defendant judgment was rendered against the said The United States Fidelity & Guaranty Company and the said The United States Fidelity & Guaranty Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America and James S. Kenyon citing and admonishing them to be
15 and appear in the Supreme Court of the United States in the City of Washington, in the District of Columbia, on the 30th day of December 1905.

Now, the condition of the above obligation is such, That if the said The United States Fidelity & Guaranty Company shall prosecute

its writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[L. S.] THE UNITED STATES FIDELITY & GUARANTY COMPANY,
RICH'D D. LANG, *Vice-Pres.*
ALBERT H. BUCK, *Ass't Sec'y.*

[L. S.] FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By THOS. A. WHELAN, *Vice-Pres.*

Attest: THOS. L. BERRY, *Ass't Sec'y.*

Approved: December 4, 1905.
ARTHUR L. BROWN,
United States District Judge.

Order Allowing Writ of Error.

(Entered December 4, 1905.)

This 4th day of December, A. D., 1905, comes the plaintiff in error, by its attorneys, and files herein and presents to the court, its petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may
16 be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff in error giving bond according to law in the sum of five hundred dollars ($500.), which shall operate as a supersedeas bond.

By the Court, Brown J., December 4, 1905.
WILLIAM P. CROSS, *Clerk.*

Certificate of Jurisdictional Question by Trial Judge.

This is an action of debt upon a bond given to the United States by a contractor under the provisions of the Act of Congress of August 13, 1894, Chapter 280, Sec. 1, 28 Stat. 278, entitled, "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works", wherein the amount involved is less than two thousand dollars. The United States Fidelity & Guaranty Company, defendant, filed its motion in writing to dismiss the action for lack of jurisdiction.

This motion was denied and exception taken to the ruling of the Court thereon, which said exception was duly allowed, and

thereafter on the 27th day of November, A. D. 1905, judgment was entered for the plaintiff.

I certify that the judisdictional question raised in this case is:—

Does the Circuit Court of the United States have jurisdiction
17 to entertain an action in the name of the United States, for the use and benefit of a person supplying labor and materials for public buildings or work, upon a certified copy of a bond given under the provisions of the Act of Congress of August 13, 1894, Chap. 280, Sec. 1, 28 Stat. 278, entitled, "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works", wherein the amount involved is less than two thousand dollars?

This certificate is made conformably to Act of Congress of March 3, 1891, Chap. 517, and the opinion filed herein is made a part of the record and will be certified and sent up as part of the proceedings, together with this certificate.

This 4th day of December, A. D., 1905.

ARTHUR L. BROWN,
District Judge Holding the Circuit Court of the United States for the District of Rhode Island.

Opinion of the Court on Motion to Dismiss for Lack of Jurisdiction.

(August 17, 1904.)

BROWN, *J.:*

These actions of debt are brought in the name of the United States on bonds given by Churchyard, a contractor. In each case, the beneficial or use plaintiff is a person who furnished labor or
18 materials of less than two thousand dollars in value for public works of the United States. The plaintiffs rely upon the Act of Congress of August 13, 1894, Chap. 280, § 1, 28 Stat. 278, entitled, "An Act for the protection of persons furnishing materials and labor for the construction of public works." Churchyard's bond to the United States conformed to that act. A breach of the condition "to promptly make payments to all persons supplying him with labor and material in the prosecution of the work" is assigned.

Unless this is a controversy "in which the United States are plaintiffs", or unless the said act confers jurisdiction where the amount is less than two thousand dollars, the motions to dismiss must be granted, for all other statutory provisions are coupled with the requirement of a jurisdictional amount larger than is involved in any one of these cases.

The defendants rely chiefly upon the decisions in United States *v.* Henderlong, 102 F. R. 2, and United States *v.* Sheridan, 119 F. R. 236. In the first case it was held that:

"The United States are neither the legal nor equitable plaintiffs in the present action, They are seeking no remedy for any injury to, or for the withholding of, any of their rights; nor have they any equitable right to or interest in the thing sued for. They have neither the legal right of action, nor any equitable interest

in the matter in controvercy. The United States are simply a formal or model party,—a mere name, used for convenience only."

It was also stated:

"No reason is perceived why the courts of the United States should take cognizance of the suits of laborers and material men, unless the citizenship of the parties, and the amount involved in the controversy, are such as would give jurisdiction as in the case of other suitors. These views find support in the decisions of the Supreme Court in Browne *v.* Strode, 5 Cranch, 303; McNutt *v.* Bland, 2 How. 9; Walden *v.* Skinner, 101 U. S. 577, 588, 589."

19 The action was dismissed for lack of jurisdiction.

In United States *v.* Sheridan, 119 F. R. 236, 239, it was said:

"But can it be maintained that congress, by permitting private litigants, under certain circumstances stated in the act, to use the name of the United States in their suits on the bond, intended thereby also to enlarge the jurisdiction of the federal courts by providing that the use of the name of the United States by such litigant should mean that such cases were to be included among those of which federal courts were given jurisdiction, upon the ground that the 'United States sued as plaintiff' within the meaning of the judiciary act, when in fact the United States did not, in any essential sense, sue at all, and had no kind of legal interest in the claim asserted by the real party to wit, the material man? It seems to me not."

It was held that, in order to maintain jurisdiction in a case of this character, the amount claimed, exclusive of interest and costs, should exceed the sum of two thousand dollars.

There are many decisions of the Supreme Court to the effect that, in determining whether a case is truly a controversy between citizens of different states, the substantial rather than the formal parties should be regarded. In Stewart *v.* Baltimore & Ohio R'y Co. 168 U. S. 445, it was said:

"For the purposes of jurisdiction in the federal courts, regard is had to the real rather than to the nominal party."

United States *v.* Bebee, 127 U. S. 338, is also an illustration of this principle. In that case, it was held that the Attorney General has authority to file a bill in equity in the name of the United States to set aside a patent of public land alleged to have been obtained by fraud or mistake, where the Government has a direct interest in the tract patented, or is under an obligation respecting the relief invoked by the bill. But the court also said (p. 346):

"An inspection of the record shows that the Government, though in name the complainant, is not the real contesting party to the title or property in the land in controversy. It has no interest in
20 the suit, and has nothing to gain from the relief prayed for, and nothing to lose if relief is denied."

For this reason, though jurisdiction was retained, it was held that the complainants could not invoke the rule that the United States are not bound by statutes of limitations, nor barred by laches.

In United States *v.* Bell Telephone Co., 167 U. S. 224, it was said: (264, 265)

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual. * * *

"Now, in the case at bar the United States has no proprietary or pecuniary interest. The result, if favorable to it, would put no money in its treasury or property in its possession. It has a standing in court either in the discharge of its obligation to protect the public against a monopoly it has wrongfully created, or simply because it owes a duty to other patentees to secure to them the full enjoyment of the rights which it has conferred by its patents to them. Perhaps both of these objects were in view. In so far as the latter was and is the purpose of this suit it brings it within the rule laid down in United States *v.* Bebee, *supra.*"

From these and other decisions, it is apparent that the question whether the United States is a party is not dependent merely upon pecuniary interest. See also, *In re* Debs, 158 U. S. 584, 586. What is the nature of the interest of the United States in the actions provided for by the act? In United States *v.* Sheridan, 119 F. R. 236, 239, it was said:

"It is true that the act of August 13, 1894, was enacted for beneficial purposes, and possibly those benefits to a certain extent may extend to the United States in making more certain and prompt the obtaining of materials and labor by contractors upon public works who have given the bond with surety upon which outside parties can rely; but it is apparent that those benefits to the United States are quite incidental, if not speculative. The real purpose of the legislation was obviously to provide a guaranty of payment to laborers and material men through the medium of the bond
21 required, inasmuch as they could not, without permission of the government, acquire any lien upon works of public improvement."

The probable object of the act of Congress was to provide an equivalent, or substitute, for the familiar legislation for the protection of laborers and materialmen. See Standard Oil Co. *v.* Trust Co., 21 App. Cases, Dist. of Columbia, 269, 275. The general nature of this kind of legislation is set forth in the able opinion of Judge Lurton in Jones *v.* Great Southern Fireproof Hotel Co., 86 F. R. 370, 383, cited with approval in Great Southern Fireproof Hotel Co. *v.* Jones, 193 U. S. 532, 549, 550.

The justification for legislation by Congress upon this subject must be that, as a builder of public works, it is entitled to provide that those persons who incorporate their labor and materials into public works shall receive protection. It hardly can be doubted that Congress might have provided for a contract between the Government and the contractor for public works which should give to the Government the right to withhold the contract price until the satisfaction

of claims for labor and material, or permit the United States to pay directly the laborers and materialmen in case of default by the contractor. Redfield *v.* Windom, 137 U. S. 636. Provisions of this general character must be regarded as sanctioned "by the dictates of natural justice;" Great Southern Fireproof Hotel Co. *v.* Jones, 193 U. S. 532, 549. If it is competent for Congress to provide for such protection by requiring from the contractor a contract with the United States, and by permitting the laborer or materialman
22 to avail himself of this contract (as I assume, since the validity of the act is not questioned), is it not also competent for Congress to permit the laborer or materialman to avail himself of the status of the United States as a suitor in the United States courts, and to maintain suit irrespective of the amount involved, and is it not reasonable to suppose that this was the intent?

I cannot agree with the statement in United States *v.* Henderlong, *supra*, that the United States is not the legal plaintiff in this action. The contract is, in the strictest sense, a contract between the United States and the contractor for public works. The defendant has bound himself to the United States to the amount of the penal sum of the bond. The penalty is defeasible upon two conditions: first, that the contractor shall do his work; second, that he shall pay his laborers and materialmen. These are actions of debt, upon which ordinarily judgment is rendered for the penal sum, to be discharged upon payment of the amount of damages. Farin *v.* Terson, 1 Black, 309; 3 Am. & Eng. Enc. Pl. & Pr. 670. That laborers and materialmen are authorized to institute an action, does not alter the legal status of the contract, or change the legal parties to the contract. A failure to pay laborers and materialmen is a breach of an obligation to the United States assumed by the contractor under the requirement of an act of Congress.

It was the apparent intent of Congress to work out the protection of materialmen and laborers through a contract between the United States and the contractor. In determining the intent of Con-
23 gress, we should look rather to the act itself than to the particular pecuniary interest of the United States in the special case before us. It is apparent that the actions provided for by the act embrace both those that may pecuniarily affect the United States and those that may not. As ordinarily interpreted, the act requires the usual penal bond with a single penalty and two distinct conditions: first, to do the work; second, to pay laborers and materialmen.

In American Surety Co. *v.* Lawrenceville Cement Co., 96 F. R. 25, 26, Judge Putnam says:

"The United States, by the force of the statute which we have cited, voluntarily make themselves trustee, alike for their own interests and for the interests of the individuals intended to be protected; and having thus voluntarily created and accepted a trust, they are barred by equitable principles from asserting for themselves any advantage over other beneficiaries."

A suit instituted by a materialman may thus directly affect the security of the United States. Was it the intent of Congress to create new and unusual actions, and to permit a multitude of simultaneous

and independent suits to be instituted on bonds of this character; and to preclude the contractor and sureties from pleading, in bar of a second suit, a former judgment for the penal sum of the bond? The practical inconvenience of so construing this statute as to allow a large number of independent suits has been well illustrated in this circuit. See American Surety Co. *v.* United States, 123 F. R. 287; American Surety Co. *v.* Lawrenceville Cement Co., 96 F. R. 251, 110 F. R. 717, 913. On suits against a surety company, judgments were had greatly in excess of the amount of its liability on a bond.

24 The bond should not be regarded as containing an agreement between the obligors and third parties, but as a contract between the United States and the contractor, in which the United States has a double interest: first, a direct pecuniary interest; and second, an interest, as a constructor of public works, to protect those persons who incorporate their labor or materials into the works. Although a private person has the right to institute a suit, yet the bond is one for the protection of the United States and other persons as well, and a judgment upon the bond should accrue to the benefit of all in interest.

Because a privilege to institute a suit upon the contract is given to beneficiaries, it does not follow that the liability to suit of the obligors and sureties is thereby enlarged. The United States is the legal plaintiff, the basis of the action is a contract between the United States and a contractor, and the statute, in express terms, authorizes the suit to be brought in the name of the United States.

It is also urged by plaintiff's counsel that the provisions allowing suits to be brought on certified copies of the contract and bond, and for security for costs, &c., are applicable only to courts subject to congressional legislation; and, therefore, that it is apparent that the intent was to give all the privileges of a suit in the name of the United States except as expressly limited. The present cases are within the letter of the statute which gives jurisdiction to the United States courts, irrespective of the amount involved, when the United States is plaintiff. Is there any sufficient reason for denying

25 jurisdiction? Persons having the legal right may sue at law in the federal courts without regard to the citizenship of those having the equitable interest. Carter on Jurisdiction of Federal Courts, p. 139. The legal right is in the United States. It is true that the courts will "look to things, not names—to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law;" but it does not invariably follow that the rule shall be so applied as to break down the distinction between legal and equitable rights, or the distinction between legal and beneficial or use plaintiffs. Established forms of contract, forms of action, modes of procedure, are often matters of substance. When Congress, to work out a specific purpose, requires a contract with the United States, and authorizes a suit on that contract, we are not at liberty to say that this mode of effecting the object is all unreal, nominal, and unsubstantial. Even if the form established for working out the purpose were somewhat fictional in

character, we should hesitate to destroy the statutory machinery if we would thereby practically frustrate the purpose of the act or impair its value.

If suits of this character are to be limited to those involving more than two thousand dollars, this practically will cut off from the courts of the United States laborers and small materialmen. If they resort to a state court, they may meet the objection that their suit is brought upon a copy of the bond, and not upon the original, and that the modes of procedure of state courts are not subject to congressional legislation. Should a laborer bring suit in a state court and secure judgment, the United States, upon subsequently
26 suing in a United States court upon this bond for a breach of the obligation to construct the works, may be met by a plea of former judgment of a state court, and thereby possibly be precluded from a second section, and be compelled to resort to intervention in the state court. The existence of a single penalty, with two distinct conditions affecting different interests, makes the case an unusual one.

The decisions in United States *v.* Henderlong, 102 F. R. 2, and United States *v.* Sheridan, 119 F. R. 236, I regard with great respect. They proceed, however, upon the ground that the United States is a purely formal or modal party in cases where there is a breach of the obligation to pay laborers and materialmen. In neither case was it considered that the actions provided for might affect the pecuniary interest of the United States and its security under the bond, as was the case in actions brought in this circuit. In United States *v.* Sheridan, the matter of benefits to the United States was considered, and it was thought that these were quite incidental, if not speculative. Possibly it was a purpose of the act to benefit the United States by making more certain and prompt the obtaining of labor and materials by contractors. It was possibly the view of Congress that the Government, as a builder of public works, is under such an obligation to those who incorporate their labor and material therein that the United States may insure their payment by exacting a contract for their benefit; and that, in a suit upon such a contract, the United States has the interest of an insurer of persons, in whose protection it has an interest analogous, perhaps, to that which it has in a suit to cancel a patent for lands or for
27 an invention, not because of any benefit to itself, but because of an obligation to the public or individuals. If Congress had sufficient grounds for enacting legislation of this class, has not the United States, as a legal party to the suit, an interest in the suit similar to that of Congress in passing the act authorizing it? There is some inconsistency in saying that the United States has such an obligation to laborers that Congress may require a contract for their benefit, but no such obligation as to give the United States an interest in the suit brought to enforce the contract.

The act has proved difficult to interpret and to apply. Its intended benefits have been impaired by expensive litigation over its interpretation. Congress has put the plaintiff in the shoes of the United States as a suitor, without expressly taking away the right to

sue in a court of the United States. Adler *v.* Newcomb, 2 Dillon, 45. Shall we take this right away by implication? The bar, in many actions in this circuit, have interpreted this act as conferring jurisdiction upon the United States courts. It seems by no means certain that it was not the intent of Congress to subrogate the materialman and laborer to all the rights of the United States as a suitor on its own contract.

The danger that statutes conferring jurisdiction on United States courts may be abused, through the use of nominal parties, is to be guarded against. When Congress, however, with power to confer jurisdiction, expressly declares that the United States shall take a contract upon which persons may sue in the name of the United States, is there any practical danger in saying that Congress
28 meant exactly what it said, and meant it with no further qualification than that expressly stated?

I have before me, as the legal plaintiff, the United States; a legal cause of action—a contract between the United States and the contractor. It is the ordinary rule that the existence of a beneficial or use plaintiff does not affect the legal status of the case. To one bred in common law practice this is sufficient, in the absence of strong reasons to the contrary. In the case of Boston Elevated Ry. Co. *v.* Grace & Hyde, 112 F. R. 279, the Circuit Court of Appeals for this Circuit had occasion to consider actions for use and benefit, and the divisibility of such causes of action; and that case well illustrates the difficulties of a departure from a common law status.

While, in some cases, to look through the nominal parties to the real parties in interest is easy; in other cases where, in a single legal contract, there is a diversity of beneficial interests, a splitting up of the case is impracticable. Such a division seems impracticable in a case where a suit is for the penal sum of a bond in which various persons have an interest. The fact that, in the ordinary bond, the United States has a real and substantial interest, seems a fair reason for adopting the view that it was the intention of Congress that, in all suits for use, the plaintiff should have the general rights of the United States to sue in federal courts.

The plaintiff's counsel contend that jurisdiction can be supported on two distinct grounds: first, because the United States has, in fact, such an interest in these suits as answers the authorities and
29 gives a reasonable basis for federal jurisdiction; second, because in addition to the provisions which authorize the suit to be brought in the name of the United States are provisions, regulating the procedure in the suits, which seem to be applicable only to federal courts, thus showing an intent that the federal courts were to have jurisdiction. I am of the opinion that we, at least, can say that the cases are within the letter of the statute conferring jurisdiction on the United States courts, and that it is not so clear that they are contrary to the spirit of that statute as to justify a dismissal. The statute was before the Circuit Court of Appeals for the Eight- Circuit in United States *v.* National Surety Co., 34 C. C. A. 526. The amount involved was less than two thousand dollars, and yet the court took jurisdiction of the action, though, so far as the report of

the case shows, the question of jurisdiction was not expressly raised.

The argument that it could not have been the intention of Congress to enlarge the jurisdiction of the United States courts by allowing claims for less than two thousand dollars to be prosecuted, seems by no means conclusive. The public works of the United States are not so numerous that the courts of the United States will be overwhelmed by petty suits. The jurisdiction of the United States courts in admiralty, over the small claims of seamen, has been beneficial, and has served rather to prevent the contesting of small claims than to overcrowd the courts with petty suits. The existence of speedy remedies, free from technical obstacles, encourages the prompt payment of debts. To hold that laborers and materialmen em-
30 ployed on public works of the United States can secure their pay through a suit in a United States court, on a bond given to the United States, will tend to promote the object of the act, and to simplify the procedure to enforce it.

The motions to dismiss for lack of jurisdiction are denied.

31

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America suing for the benefit of James S. Kenyon, of the City and County of Providence, in the State and District of Rhode Island, doing business as Burrows & Kenyon, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, in the city of Washington, D. C., on the* 30th day of December next, pursuant to a Writ of Error filed in the Clerk's Office of the† Circuit Court of the United States for the District of Rhode Island, wherein The United States Fidelity and Guaranty Company of the State of Maryland is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur L. Brown, Judge of the Circuit Court of the United States for the District of Rhode Island, this 4th day of December, in the year of our Lord one thousand nine hundred and five.

[Seal of Circuit Court, Rhode Island.]

ARTHUR L. BROWN,
United States District Judge.

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*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

Due and sufficient service of the citation is hereby acknowledged.

EDWARD D. BASSETT,
Attorney for Defendant in Error.

32 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of Rhode Island:*

I, William P. Cross, Clerk of the Circuit Court of the United States for the District of Rhode Island, do hereby certify that the foregoing is a true copy of the record in the cause entitled Law 2713, United States of America, Plaintiff, *vs.* Joseph J. Churchyard, and the United States Fidelity and Guaranty Company, Defendants, in said Circuit Court determined, the Opinion of the Circuit Court on motion to dismiss for want of jurisdiction, and Certificate of Jurisdictional Question by Trial Judge, the Petition for Writ of Error, the Bond on Writ of Error and the Assignment of Errors, also the original Citation issued on the Writ of Error in said cause, with the Acknowledgment of Service thereon.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, at Providence, in said district, this nineteenth day of December, A. D., 1905.

[Seal of Circuit Court, Rhode Island.]

WILLIAM P. CROSS, *Clerk.*

Endorsed on cover: File No. 20,024. Rhode Island C. C. U. S. Term No. 173. The United States Fidelity and Guaranty Company, plaintiff in error, *vs.* The United States of America, suing for the benefit of James S. Kenyon, doing business as Burrows & Kenyon. Filed December 26th, 1905. File No. 20,024.